1994

# Crescentwood Village v. June Johnson : Brief of Appellant

Utah Court of Appeals


Ashton, Braunberger, Poulsen & Boud; James R. Boud; Attorneys for Appellee.
Anderson & Karrenberg; John T. Anderson; Attorneys for Appellant.

**IN THE UTAH COURT OF APPEALS**

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| CRESCENTWOOD VILLAGE, INC., | ) | |
| | ) | **BRIEF OF APPELLANT** |
| Plaintiff/Appellee, | ) | |
| | ) | |
| v. | ) | |
| | ) | Case No. 950128-CA |
| JUNE JOHNSON, | ) | (Priority No. 15) |
| | ) | |
| Defendant/Appellant. | ) | |

Appeal From a Final Judgment
of the Third Judicial District Court
of Salt Lake County, Utah.

The Honorable Tyrone E. Medley

ANDERSON & KARRENBERG
John T. Anderson (#0094)
Attorneys for Appellant,
June Johnson
700 Bank One Tower
50 West Broadway
Salt Lake City, Utah 84101-2006
Telephone (801) 534-1700

ASHTON, BRAUNBERGER, POULSEN & BOUD
James R. Boud, Esq.
Attorneys for Appellee,
Crescentwood Village, Inc.
302 West 5400 South, Suite 103
Murray, Utah 84017
Telephone (801) 263-0300

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Murray, Utah 84017
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## I.

## JURISDICTIONAL STATEMENT

This appeal is from a final Judgment dated December 2, 1994 (a copy of which is attached hereto as Appendix A), entered by The Honorable Tyrone E. Medley of the Third Judicial District Court of Salt Lake County, Utah. The Utah Supreme Court had jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2-2(3)(j). The Supreme Court, acting pursuant to Rule 42, Utah Rules of Appellate Procedure, transferred this appeal to this court by order dated February 16, 1995.

## II.

## ISSUE PRESENTED FOR REVIEW AND STANDARD OF APPELLATE REVIEW

The issue presented for review is as follows:

Whether the trial court erred in concluding that a mobile home park lessor's temporary waiver of its right to declare an immediate forfeiture of a lease with its lessee did not, as a matter of law, require the lessor to notify the tenant that unless she cured her default by a date certain, the lessor would proceed with its forfeiture remedy.

This issue is a question of law on which this court will not defer to the trial court, but will review the trial court's determination for correctness. Pratt by and through Pratt v. Mitchell Hall Irrigation Co., 813 P.2d 1169, 1171 (Utah 1991); Avila v. Winn, 794 P.2d 20, 22 (Utah 1990).

## III.

## DETERMINATIVE STATUTES, ORDINANCES OR RULES

There are no constitutional provisions, statutes, ordinances or rules whose interpretation is believed to be solely determinative of the issues on appeal.

## IV.

## STATEMENT OF THE CASE

### A. Nature of the Case.

Appellee Crescentwood Village, Inc. ("CVI") instituted this action under the Utah Mobile Home Park Residency Act, Utah Code Ann. §§ 57-16-1 et seq., to terminate the interest of its lessee, appellant June Johnson ("Mrs. Johnson") in a lease agreement dated July 1, 1992 ("Lease Agreement")[1] and dispossess Mrs. Johnson from the leased property ("Property"). (R. 2-11). CVI's claimed basis for terminating the Lease Agreement and evicting Mrs. Johnson from the Property was her failure to cure several alleged violations of rules governing the Property. Id.

### B. Course of Proceedings and Disposition in Trial Court.

Shortly after CVI filed its complaint, Mrs. Johnson began depositing with the court clerk the rent payments due under the Lease Agreement. (R. 64-66). She made all of the required payments. (R. 632).

At trial, the court determined that Mrs. Johnson completely cured two, and substantially cured one, of the three events of default specified in CVI's notice of default ("Notice of

[1] A copy of the Lease Agreement is attached hereto as Appendix B.

Default"),[2] and that she did so within the required fifteen day cure period. (R. 605). The court further determined that over the next seventy days, CVI took no action to terminate the Lease Agreement, but instead "tried to work with [her]." (R. 610).[3] At the end of this seventy day period of forbearance, CVI provided Mrs. Johnson with two verbal warnings that "things weren't looking good" and that it would evict her "if things didn't get going." (Tr. at R. 750-51). These warnings never specified a date certain by which the uncured event of default had to be cured for Mrs. Johnson to avoid being evicted. (Tr. at R. 751-52). About three days later, Mrs. Johnson paid two months of back rent in response to CVI's written demand. (Tr. at R. 695). CVI accepted her payment. Id. However, on the following day, CVI served Mrs. Johnson with a Notice of Termination.[4] (R. 606).

The court held that even though CVI had relaxed the fifteen day cure period specified in the Notice of Default by "work[ing] with" Mrs. Johnson for seventy days in an effort to cure the single uncured event of default, CVI could summarily terminate the Lease Agreement at the end of that forbearance period without apprising Mrs. Johnson of a date certain by which her full cure was required. (R. 607, 610). The court accordingly entered judgment against Mrs. Johnson for rent in the amount of $3,200.00 and attorney's fees and costs in the amount of

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[2] A copy of the Notice of Default is attached hereto as Appendix C.

[3] In correctly determining that CVI relaxed the requirement in the Notice of Default that any cure be accomplished within the specified fifteen-day period, the court properly credited the trial testimony of CVI's park manager that "[a]fter agreeing with her that it [the Property] was really starting to look better we would just go on past that 15-day notice . . . ." (Tr. at R. 739).

[4] A copy of the Notice of Termination is attached hereto as Appendix D.

$9,413.50. (R. 617-18). The court further evicted Mrs. Johnson from the Property and terminated her interest in the Lease Agreement. Id. This relief was embodied in the court's Judgment dated December 2, 1994 and was based upon its Findings of Fact and Conclusions of Law.[5] Mrs. Johnson filed her notice of appeal on December 12, 1994. (R. 619).

**C. Statement of Facts.**

Both before and after the Lease Agreement was signed in July 1992, CVI and Mrs. Johnson had numerous disputes regarding the terms and conditions of Mrs. Johnson's occupancy of the Property. (Finding of Fact No. 21, R. 610; Tr. at R. 654, 671). The parties' efforts to resolve those disputes resulted in a "pattern" under which CVI ". . . tried to work with [Mrs. Johnson]." (Finding of Fact No. 21, R. 610). Near the end of this "pattern," on May 6, 1993, CVI served Mrs. Johnson with the Notice of Default. (Finding of Fact No. 7, R. 605).

The Notice of Default apprised Mrs. Johnson that she was in violation of the Lease Agreement for three reasons: (i) she maintained an unlicensed motor vehicle in her driveway ("Event of Default No. 1"), (ii) her yard had too many weeds and her driveway was too cluttered ("Event of Default No. 2"), and (iii) her home needed to be repainted ("Event of Default No. 3") (collectively, the "Events of Default"). Id. The Notice of Default advised Mrs. Johnson that she had fifteen days in which to cure the Events of Default, and that if she failed to do so within that period of time, CVI would commence eviction proceedings. Id. The second unnumbered paragraph of the Notice of Default advised Mrs. Johnson that if she actually

[5] A copy of the Findings of Fact and Conclusions of Law is attached hereto as Appendix E.

cured the Events of Default, but later violated the same or different rules of the mobile home park, ". . . this will result in forfeiture of [her] lease and eviction without any further period of cure." Id.[6]

Of the three Events of Default, the trial court properly determined that Mrs. Johnson had fully and timely cured Event of Default No. 1 and Event of Default No. 3, but had only substantially cured Event of Default No. 2. (Finding of Fact Nos. 7, 8, R. 605). After the fifteen day cure period specified in the Notice of Default expired on May 21, 1993, CVI took no action to terminate the Lease Agreement or dispossess Mrs. Johnson from the Property. (Tr. at R. 739, 747). Rather, because Mrs. Johnson had cured Event of Default No. 1 and Event of Default No. 3, and was attempting to cure Event of Default No. 2, CVI agreed ". . . to work with her for awhile." (R. 610; Tr. at R. 747). According to the testimony of CVI's own manager, CVI ". . . agree[d] with [Mrs. Johnson] that it [the Property] was really starting to look better [and] we would just go on past that 15-day notice . . . ." (Tr. at R. 739). Therefore, CVI extended through late July 1993 -- some seventy days after the expiration of the fifteen day cure period specified in the Notice of Default -- the period within which Mrs. Johnson could cure Event of Default No. 2. (Tr. at R. 747).

However, at the end of July 1993 -- two or three days after Mrs. Johnson had given birth to her new baby, Tr. at R. 753 -- CVI's manager told Mrs. Johnson that ". . . we could not

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[6] Because the trial court determined that Mrs. Johnson did not cure all the Events of Default, see Findings of Fact Nos. 7 and 8 at R. 605, this provision of the Notice of Default -- a provision which presumes to confer on CVI the right to summarily forfeit the Lease Agreement -- is not applicable as a matter of law.

work with her any longer and that we would be evicting if things didn't get going at the end of July." (Tr. at R. 751). That oral notification never specified a date certain by which Mrs. Johnson had to fully cure Event of Default No. 2 to avoid having the Lease Agreement forfeited. (Tr. at R. 751-52). According to CVI's manager, the only date certain that CVI had ever provided to Mrs. Johnson was the fifteen day cure period specified in the Notice of Default. (Tr. at R. 752).

In the meantime, about two weeks earlier on July 14, 1993, CVI served Mrs. Johnson with a Three Day Notice to Pay Rent or Vacate the Property ("Three-Day Notice"). (Tr. at R. 694-95). In response to the Three-Day Notice, Mrs. Johnson paid all of the required rent with a check that she delivered to CVI on August 2, 1993. (Tr. at R. 695). At the time CVI accepted that payment, it knew that on the following day it would be seeking to terminate the Lease Agreement. (Tr. at R. 700, 760). However, CVI never informed Mrs. Johnson of that fact. (Tr. at R. 704). CVI accordingly served Mrs. Johnson with its Notice of Termination on August 3, 1993. (Tr. at R. 665). Even after CVI purported to terminate the Lease Agreement, CVI consistently noted on its payment ledger card that Mrs. Johnson was responsible for the payment of late charges owing under the Lease Agreement. (Trial Exhibit 46; Tr. at R. 694).

Mrs. Johnson asserted at trial that under Utah law, once CVI relaxed the fifteen day cure period specified in its Notice of Default, CVI could not subsequently insist upon strict compliance with the Notice of Default without providing an unequivocal notice that tardy performance would not be further tolerated. (Tr. at R. 766-72). The trial court, however, held

that no such notice was required. (Finding of Fact No. 13, R. 607). It accordingly entered judgment against Mrs. Johnson for unpaid rent, attorney's fees, and forfeiture of the Lease Agreement. (R. 617-18).

## V.

## SUMMARY OF ARGUMENT

Under the Notice of Default that CVI served upon Mrs. Johnson, Mrs. Johnson was granted a period of fifteen days in which to cure the Events of Default or face eviction from the Property. Because Mrs. Johnson timely and fully cured two, and substantially cured one, of the three Events of Default, CVI decided to work with Mrs. Johnson beyond the fifteen day cure period. In doing so, CVI temporarily waived its right to immediately forfeit the Lease Agreement and evict Mrs. Johnson from the Property.

Utah law has long recognized that a promisee who has informed its promisor that strict performance will not be required, but who later decides to require strict performance, must provide the promisor with reasonable, advance notice that no further forbearance will be granted. Under this principle, CVI was required to provide Mrs. Johnson with an unequivocal notice that her failure to cure all of the Events of Default by a date certain would result in CVI's forfeiture of the Lease Agreement and Mrs. Johnson's eviction from the Property. CVI's decision to pull the forfeiture trigger on Mrs. Johnson without such notice violated Utah law.

## VI.

## ARGUMENT

**AFTER CVI AGREED TO RELAX THE FIFTEEN DAY CURE PERIOD SPECIFIED BY ITS NOTICE OF DEFAULT, IT WAS REQUIRED BY UTAH LAW TO PROVIDE MRS. JOHNSON WITH REASONABLE NOTICE OF A NEW DATE CERTAIN BY WHICH MRS. JOHNSON WAS REQUIRED TO CURE.**

Utah law ". . . disfavor[s] forfeiture where the [promisee] has misled the [promisor] into thinking that the forfeiture provision will not be strictly enforced." Adair v. Bracken, 745 P.2d 849, 852 (Utah App. 1987).[7] Accord, Grow v. Marwick Dev., Inc., 621 P.2d 1249, 1251-52 (Utah 1980). This is an extension of the principle that a promisee who has induced its promisor to believe that strict performance will not be required, must provide the promisor with reasonable, advance notice before it can insist on strict performance. Pacific Dev. Co. v. Stewart, 195 P.2d 748, 750 (Utah 1948). Accord, 49 Am. Jur. 2d Landlord & Tenant § 327 (1995) ("[t]he landlord must give sufficient notice to the lessee of the landlord's intent to insist upon strict compliance with the lease terms where such compliance has not been required in the past"); Angus Hunt Ranch, Inc. v. REB, Inc., 577 P.2d 645, 650 (Wyo. 1978) ("so where the time fixed by the contract for performance is permitted to pass, both parties concurring, the time of performance thereafter becomes indefinite, and one party cannot rescind until full notice and a reasonable time for performance is given"). This principle means that ". . . the acceptance by the [promisee] of the [promisor's] past due payments and its other conduct towards the

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[7] Because ". . . forfeiture is a harsh remedy, clarity must be required before any notice will work such a result." Dang v. Cox Corp., 655 P.2d 658, 662 (Utah 1982). Accord, Russell v. Park City Corp., 546 P.2d 1274, 1276 (Utah 1973).

[promisor] leading the latter to believe that strict performance would not be required by the [promisee], imposes upon the [promisee] the duty of giving to the [promisor] a reasonable notice before it may insist on strict performance by the [promisor]." Pacific Dev. Co., 195 P.2d at 750.

The requirement of such notice ". . . is based upon the equitable consideration that by his conduct the [promisee] has led the [promisor] into the belief that the former will continue to waive the strict performance of the contract." Id. See also Tanner v. Baadsgaard, 612 P.2d 345, 347 (Utah 1980) (seller who waives strict compliance with payment schedule in earnest money agreement must give notice and a reasonable time to perform before thereafter strictly enforcing the time requirement); Morris v. Sykes, 624 P.2d 681, 684 (Utah 1981) (where contracting parties were negotiating a reinstatement at the time of seller's notice of termination of contract, "fairness" would require definite notice to buyer upon default that he must "pay up, or forfeit" the payments he had made under the contract). Fuhriman v. Bissegger, 375 P.2d 27, 28 (Utah 1962) (where the promisee had waived strict or substantial compliance and had failed to unequivocally apprise the promisor of what was required of him to avoid termination, ". . . this behavior led [the promisor] to believe that strict performance is not required.")

Where the promisee has temporarily waived default and has made contradictory demands, this ". . . would leave some doubt in the [promisor's] mind as to what the [promisee] expected and lead the [promisor] to believe that strict compliance with the contract is not required, estop[ping] [the promisee] from effecting a forfeiture of the [promisor's] interest." Grow v.

Marwick Dev., Inc., 621 P.2d at 1252. The right of the promisor to receive a notice specifying that it has a reasonable time in which to cure its default is necessary because "without this notice the defaulting [promisor] would not know what to do." Hansen v. Christensen, 545 P.2d 1152, 1154 (Utah 1976). In the final analysis, a promisee has no obligation to grant forbearance to its promisor beyond what is required by their contract and specified by the promisee's notice; however, once the promisee does so, it cannot decide unilaterally to insist on strict performance without providing its debtor with advance notice that strict performance will be required. Adair, 745 P.2d at 859; Tanner, 612 P.2d at 347; Fuhriman, 375 P.2d at 28; Pacific Dev., 195 P.2d at 750.

In this case, it is undisputed that CVI agreed to relax the fifteen day cure period specified in its Notice of Default. CVI's own on-site manager testified that he ". . . agree[d] with [Mrs. Johnson] that it [the Property] was really starting to look better [and] we would just go on past that 15-day notice . . . ." (Tr. at R. 739). It is also undisputed that that forbearance period extended for about 70 days, more than quadruple the initial specified cure period. (Tr. at R. 747). Once CVI agreed to relax or waive Mrs. Johnson's initial obligation to comply strictly with the cure period specified in the Notice of Default, CVI was obligated by Utah law to afford Mrs. Johnson a reasonable opportunity to cure the uncured event of default by a date certain or face forfeiture. Adair, 745 P.2d at 859; Tanner, 612 P.2d at 347; Fuhriman, 375 P.2d at 28; Pacific Dev., 195 P.2d at 750. CVI, however, never provided such an opportunity and never specified a date certain beyond which Mrs. Johnson faced immediate forfeiture of the

Lease Agreement and eviction from the Property. Rather, CVI only told Mrs. Johnson in late July 1993 that "things weren't looking good" and that it would evict her if "things didn't get going." (Tr. at R. 750-51). About three days later, Mrs. Johnson paid, and CVI accepted, past due rent in response to a Three-Day Notice which had been served on her two weeks earlier. (Tr. at R. 695). The following day, however, CVI unexpectedly pulled the forfeiture trigger on Mrs. Johnson and served her with a Notice of Termination. (R. 606).

CVI's failure to provide Mrs. Johnson with a notice that it would require strict performance after a seventy day period of mutually agreed forbearance violated Utah law. The trial court's failure to apply settled law to the undisputed facts enabled CVI to forfeit the Lease Agreement and dispossess Mrs. Johnson from the Property when CVI had no legal right to do so. This Court accordingly should vacate the Judgment and remand the case with instructions to enter judgment in favor of Mrs. Johnson for all of the attorney's fees and costs that she has incurred to vindicate her rights under the Lease Agreement.

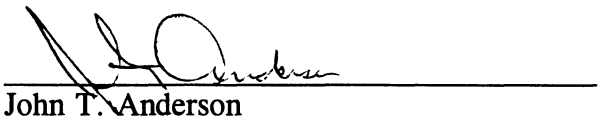
## CONCLUSION

The trial court erred, as a matter of law, in declining to apply the settled legal principle that a promisee who relaxes the requirement of strict performance cannot thereafter insist on strict performance without providing its promisor with reasonable advance notice that strict performance will be required by a date certain in the future. This Court should, therefore,

reverse and vacate the Judgment and remand this case to the district court with instructions to enter judgment in favor of Mrs. Johnson for all attorney's fees and costs that she reasonably and necessarily incurred to enforce her rights under the Lease Agreement.

DATED this 4 day of May, 1995.

ANDERSON & KARRENBERG

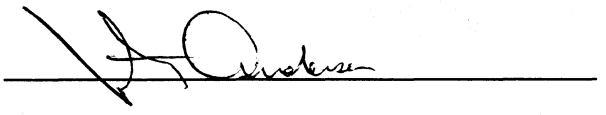


John T. Anderson
**Attorneys for Defendant/Appellant**

**CERTIFICATE OF SERVICE**

I hereby certify that on this 4 day of May, 1995, I caused two true and correct copies of the foregoing **Brief of Appellant** to be mailed, via first-class, postage prepaid, to the following:

James R. Boud, Esq.
302 West 5400 South, Suite 103
Murray, Utah 84107



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# APPENDIX

Tab A

James R. Boud, USB #A0388
Bradley R. Jones, USB #A4747
ASHTON, BRAUNBERGER, POULSEN & BOUD, P.C.
Attorneys for Plaintiff
302 West 5400 South, Suite 103
Murray, Utah 84107
Telephone: (801) 263-0300

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

| | |
|---|---|
| CRESCENTWOOD VILLAGE, INC., Plaintiff, vs. JUNE JOHNSON, Defendant. | 2196604 12-5-94-814am. JUDGMENT Civil No. 930906137 Judge Tyrone Medley |

The trial in the above case was heard before the Honorable Tyrone E. Medley on Wednesday, November 2, 1994. The Court having entered its Findings of Fact and Conclusions of Law, hereby grants judgment in favor of Plaintiff and against the Defendant and ORDERS, ADJUDGED AND DECREES as follows:

1. Plaintiff is granted judgment against Defendant for the sum of $3,200.00 principal, $9,367.50 attorney's fees, and $46.00 costs for a total judgment of $12,613.50.

2. The lease agreement between the Plaintiff and Defendant for the premises located at 255 East Hidden View Drive, #267, Sandy, Utah, is hereby terminated and the Clerk of the Court is directed to issue to Plaintiff a writ of restitution which will

direct the Constable and/or Sheriff of Salt Lake County to restore the premises to the Plaintiff.

3. The third party complaint filed in this action is hereby dismissed with prejudice.

4. The Clerk of the Court is directed to turn over to Plaintiff all rents that are currently being held in trust relating to this matter. Plaintiff is to credit Defendant these amounts upon receipt of the same.

5. Plaintiff is awarded after-accruing costs and after-accruing attorney's fees upon application to the Court for the same and a determination by the Court that such costs and fees are reasonable.

DATED this 2 day of Dec, 1994.

BY THE COURT:

Tyrone E. Medley

Judge Tyrone E. Medley

STATE OF UTAH THIRD DISTRICT COURT SALT LAKE

APPROVED AS TO FORM:

John T. Anderson
Attorney for Defendant

014-072-bn

Tab B

CRESCENTWOOD VILLAGE
240 EAST 11400 SOUTH
SANDY, UTAH 84070

# LEASE

reement entered into this 1 day of July 1992

tween CRESCENTWOOD VILLAGE ("Park") which is owned and operated by escentwood Village, Inc., a Utah corporation, and _____ and Jane Johnson ("Resident(s).")

Park agrees to lease space # 267, located at 255 E. Hidden View Drive, Sandy, Salt Lake County, Utah, to Resident(s) a month-to-month basis commencing on the 1 day of July, 92, for the sum of $185.00 per month, payable in dvance on or before the first day of each month. Rent may be increased upo days written notice. Resident(s) shall give Park 30 days written notic ior to vacating premises.

Security Deposit. A Security Deposit in the amount of $150.00 Paid eceipt of which is hereby acknowledged, shall secure the payment of an, amage beyond normal wear and tear to the premises caused by Resident(s) or ay be applied to costs of maintaining Resident(s) space as needed. An, alance remaining upon termination shall be returned to Resident(s). esident(s) shall not have the right to apply the Security Deposit in payment f the last month's rent.

Late Charges and Dishonored Bank Checks. In the event rent is not paid ithin five (5) days after due date, Resident(s) agree(s) to pay a late harge of $5.00. In the event rent is not paid within fifteen (15) days afte ue date, Resident(s) agree to pay an additional late charge of $10.00. esident(s) agree(s) to further pay $15.00 for a dishonored bank check. If a heck is dishonored, the Park may require Resident(s) to make all future ayments with cash or cashier's check.

Deposit Refunds. Any returnable deposits shall be delivered or mailed to esident(s) within thirty (30) days of termination of tenancy or within ifteen (15) days of receipt of Resident(s)' new mailing address, whichever is ater.

Use and Multiple Occupancy. The premises shall be used as a residence by the undersigned adult(s) and 6 children, and for no other purpose without the prior written consent of the Park.

Any children born to or legally adopted by Resident(s) after moving into Park shall be accepted, and Resident(s) will be charged $3.00 per month per each additional child.

Occupancy by guests, whether or not related to Resident(s), staying over fifteen (15) days will be considered to be in violation of this provision unless prior written consent is given by the Park.

Park Rules. A copy of Park Rules is attached and hereby made a part of this lease. Rules may be changed by the Park by giving 60 days written notice to Resident(s). Rule changes are incorporated as a part of this lease. Resident(s) shall also be bound by all rules pertaining to the use of all common areas, including, but not limited to, the recreation building or clubhouse and swimming pool.

Unlawful and Disorderly Conduct. Resident(s) shall not permit any unlawful or immoral practice to be committed on the premises. Any conduct which is defined as criminal or unlawful under the provisions of Utah state law, or by local ordinance or statute, whether or not prosecuted by government, shall be grounds for termination of this lease. Disorderly conduct, abusive language, noisy disturbances, disregard of park rules, and interference with the peaceful and quiet enjoyment of other residents is prohibited. Receipt of complaints from three or more residents regarding Resident(s) conduct shall be the basis for termination of this lease.

Nuisance. Resident(s) shall not create or permit a nuisance on the premises.

Resident(s) Liability. Resident(s) shall be liable and responsible for the conduct of their spouse, children, and guests.

Ordinances and Statutes. Resident(s) shall comply with all codes, statutes, ordinances and requirements of all municipal, county, state, and federal authorities now in force, or which may hereafter be in force, pertaining to their mobile home and the use of premises.

Pets. No pets shall be brought on the premises without the prior written consent of the Park.

Sublease and Assignment. This lease may not be transferred or assigned, nor the premises sublet without the written consent of the Park.

Entry and Inspection. Park and Park's agents shall have access to the leased premises at all reasonable times to inspect and protect the same, to show the same to prospective residents and for making necessary improvements and repairs.

Repairs. Resident(s) shall, at own expense, and at all times, maintain the premises in a clean and sanitary manner. Resident(s) shall be responsible for all repairs and for damages caused by his negligence and that of his family or invitees or guests.

Indemnification. Park will not be responsible for accidents, injuries, loss of property by fire, theft, wind, floods, or other natural acts which e beyond its control. Park shall not be liable for any damage or injury to sident(s), or any other person, or to any property, occurring on the emises, or any part thereof, or in common areas, and Resident(s) shall hold rk harmless from any claims for damages regardless of cause. Equipment and paratus furnished on the grounds are solely for the convenience of residents d all persons using same do so at their own risk.

Waiver. No failure of Park to enforce any term hereof shall be deemed a iver, nor shall any acceptance of a partial payment of rent be deemed a iver of Park's right to the full amount.

Default. Should Resident(s) fail to pay rent when due or violate any le or other term or condition of this lease, Park may elect to (a) continue e lease in effect and enforce all its rights and remedies hereunder, ncluding the right to recover the rent as it becomes due, or (b) at any time, erminate all of Resident(s) rights hereunder and recover from Resident(s) all amages the Park may incur by reason of the breach of the lease. All property n the premises is hereby subject to a lien in favor of Park, for payment of ll sums due to the maximum extent allowed by law.

Notices. Any notice may be given by mailing the same, postage prepaid, to esident(s) at the premises. the Park manager. Mike + Brenda Shupe, hose address is 240 East 11400 South, Sandy, Utah is authorized to ct on behalf of the Park to receive notices concerning the daily operation of he Park. Service of process upon Park may only be made by service upon Jay asmussen, 1979 East Vine St., Suite 240, Salt Lake City, Utah 84121.

Attorney's fees. In the event Park refers this Lease to an attorney for nforcement or termination, with or without suit, Resident(s) shall pay all osts incurred, including attorney's fees.

Time. Time is of the essence of this agreement.

CRESCENTWOOD VILLAGE

Brenda Shupe
Manager

RESIDENT(S)

Jeri Johnson

_____

Tab C

9

TO: JUNE JOHNSON
255 E.HIDDEN VIEW DRIVE #267
SANDY,UTAH 84070

You are hereby notified that you are in violation of the park rules an/or leasehold provisions for the following reasons:

1. UNLICENSED VEHICLE-(WHITE CADILLAC) IN DRIVEWAY RULE #25.

2. YARD NOT MAINTAINED IN A NEAT,CLEAN,WEED FREE CONDITION, SWAMP COOLER AND BICYCLE PARTS,AND ALL MICELLANEOUS ITEMS MUST BE STORED PROPERLY, OUT OF DRIVEWAY.

3. HOME NEEDS TO BE PAINTED.

Pursuant to Section 57-16-6(2)(a), Utah Code Annotated, you are hereby notified that you must cure the aforesaid violations within fifteen (15) days of the date of service of this Notice on you by curing and/or refraining from the above violations. If you fail to cure and/or refrain the referred to violations within said fifteen (15) day period, or a written agreement is not made between the park and you allowing for a variation in the rule or cure period, or vacate the premises within such period of Fifteen (15) days, you will be in violation of the above states statute and your lease agreement and rules of the park. If you fail to cure the violations, eviction will be commenced against you to evict you from the premises and to obtain judgment against you for any rent and other charges accrued, together with attorney's fees and costs.

You are further put on notice, pursuant to Section 57-16-5(2), Utah Code Ann., 1953 as amended, that in the event you cure the above referred to violations, and should you in the future again violate the above rules or a different rule of the park, this will result in forfeiture of your lease and eviction without any further period of cure.

This Notice is given and served in accordance with Sections 57-16-3, 57-16-5 and 57-16-6, Utah Code Ann., 1953, as amended.

Please govern yourself accordingly.

DATED this 5 day of MAY, 1993.

By: [signature]
Manager for CRESCENTWOOD
Mobile Home Park
Address: 250 EAST 11400 SOUTH
SANDY,UTAH 84070
Telephone: 572-6333

**Jay Weaver**

Constable
Salt Lake County
P.O. Box 538
Sandy, Utah 84091
Phone: (801) 571-7211

STATE OF UTAH )
COUNTY OF SALT LAKE )

# CONSTABLE'S RETURN OF SERVICE

I do hereby make return of service and certify:

1. I am a duly qualified and acting Constable for the County of Salt Lake, State of Utah, a citizen of the United States of America, a person over the age of eighteen at the time of this action, and that I am not a party to this action.

2. I received the within and hereto annexed ~~AFFIDAVIT AND ORDER~~ Landlords 15 Day Notice ~~SUMMONS AND COMPLAINT~~

on the 6 day of May, 1993, and served the same upon

June Johnson

the within named defendant on the 6 day of May, 1993, by then and there delivering and leaving a true copy of said paper with

Mrs "Johnson" husband to "wives" was there too.

the "Co-wives" of said defendant, being a person of suitable age and discretion at the time of said service, residing at

255 E Hidden View Dr. Sandy

which is the usual place of abode or business of said defendant, and by mailing a copy.

3. I do further certify and return that at the time of said service I did endorse the date of service, and my name and official title on the copy so served.

DATED AT SANDY, SALT LAKE COUNTY, STATE OF UTAH, ON 5-6, 1993.

FEE : $ 6.00

MILEAGE : $ 3.00
MILES 3
TRIPS 1

2ND ADDRESS :

MILEAGE : $

TOTAL : $ 9.00

JAY WEAVER
CONSTABLE, SALT LAKE COUNTY

Subscribed to me this date: 5/6/93

S W Weaver
NOTARY PUBLIC

S. W. WEAVER
NOTARY PUBLIC - STATE of UTAH
9702 SOUTH KRISTIN DRIVE
P.O. BOX 538
SANDY, UT. 84091

Tab D

TO: JUNE JOHNSON
255 E.HIDDEN VIEW DRIVE #267
SANDY,UTAH 84070

You are hereby notified that you must remove the mobile home, yourself and the other residents living in the mobile home from the premises located at the address set forth above within three (3) days of your receipt of this notice.

You were served with a fifteen day notice on MAY 5, 1993 for non-compliance of mobile home park rules. A copy of said notice is attached hereto. Pursuant to Section 57-16-5(2), Utah Code Annotated (1953), repeated failure to abide by mobile home park rules, after being served with a prior fifteen day notice of non-compliance, may result in termination of the lease. The applicable portion of Section 57-16-5(2) states as follows:

> An agreement for the lease of mobile home space in a mobile home park may be terminated during its term by mutual agreement or for any one or more of the following causes: ....(2) Repeated failure of a resident to abide by a mobile home park rule, if the original notice of non-compliance states that another violation of the same or a different rule might result in forfeiture, without any further period of cure.

You are now again violating the rules of the mobile home park for the following reasons:

1. YARD NOT MAINTAINED IN A CLEAN,NEAT AND WEED FREE CONDITION,WEEDS ALONG BOTH SIDES OF DRIVEWAY,RAILING NOT INSTALLED ON BACK PORCH.
2. WEEDS IN EAST SIDE OF YARD,BICYCLE PARTS,WOODEN PALLETS AND MICELLANEOUS TRASH IN YARD.
3. SON-JARED BEAGLEY HAS BEEN OUT AFTER CURFEW ON SEVERAL OCCASIONS.

If you do not remove your mobile home, yourself, and any other residents living in the mobile home, from the park within three (3) days after service of this notice, you will be in violation of the above states statute and your lease agreement and the rules of the Park. If you fail to move out of the Park within the above stated time, an action will be commenced against you to evict you from the premiss and to obtain judgment against you for the rent and other charges accrued, together with attorney fees and costs.

This Notice is given and served in accordance with the provisions of Sections 57-16-5 and 57-16-6, Utah Code Ann., 1953, as amended.

Please govern yourself accordingly.

DATED this 3 day of AUGUST, 1993.

By: [signature]
Manager for CRESCENTWOOD VILLAGE
Address: 250 EAST 11400 SOUTH
SANDY ,UTAH 84070
Telephone: 572-6333

8-3-93

Served

**Jay Weaver**

Constable
Salt Lake County
P.O. Box 538
Sandy, Utah 84091
Phone: (801) 571-7211

STATE OF UTAH )
COUNTY OF SALT LAKE )

CONSTABLE'S RETURN OF SERVICE

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I do hereby make return of service and certify:

1. I am a duly qualified and acting Constable for the County of Salt Lake, State of Utah, a citizen of the United States of America, a person over the age of eighteen at the time of this action, and that I am not a party to this action.

2. I received the within and hereto annexed ~~AFFIDAVIT AND ORDER~~ Lease Termination Not ~~SUMMONS AND COMPLAINT~~

on the 3 day of Aug, 1993, and served the same upon

June Johnson

the within named defendant on the 3 day of Aug, 1993, by then and there delivering and leaving a true copy of said paper with

"Linda"

the "Co-wife" of said defendant, being a person of suitable age and discretion at the time of said service, residing at

255 E Hidden View Dr. #267 Sandy

which is the usual place of abode or business of said defendant, and by mailing a copy.

3. I do further certify and return that at the time of said service I did endorse the date of service, and my name and official title on the copy so served.

DATED AT SANDY, SALT LAKE COUNTY, STATE OF UTAH, ON 8-3, 1993.

FEE : $ 6.00

MILEAGE : $ 3.00
MILES 3
TRIPS 1

2ND ADDRESS :

---

MILEAGE : $

TOTAL : $ 9.00

JAY WEAVER
CONSTABLE, SALT LAKE COUNTY

Subscribed to me this date: 8/3/93

S W Weaver
NOTARY PUBLIC

S. W. WEAVER
NOTARY PUBLIC - STATE of UTAH
8702 SOUTH KRISTIN DRIVE

Tab E

James R. Boud, USB #A0388
Bradley R. Jones, USB #A4747
ASHTON, BRAUNBERGER, POULSEN & BOUD, P.C.
Attorneys for Plaintiff
302 West 5400 South, Suite 103
Murray, Utah 84107
Telephone: (801) 263-0300

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

| | |
|---|---|
| CRESCENTWOOD VILLAGE, INC., Plaintiff, vs. JUNE JOHNSON, Defendant. | FINDINGS OF FACT AND CONCLUSIONS OF LAW<br><br>Civil No. 930906137<br>Judge Tyrone Medley |

The trial in the above case was held before the above Court on Wednesday, November 2, 1994, the Honorable Tyrone E. Medley, presiding. James R. Boud appeared on behalf of Plaintiff, and John T. Anderson appeared on behalf of Defendant. The parties were also present along with various witnesses. The Court, after considering the evidence introduced during the course of the trial, reviewing the exhibits, giving consideration to the trial brief submitted by Mr. Anderson, reading the cases referred to in the trial brief, considering the principles of law and considering the testimony of witnesses, makes the following Findings of Fact and Conclusions of Law:

## FINDINGS OF FACT

1. The Court finds that the parties entered into a lease agreement, which lease agreement included as an attachment all of the rules and regulations of the mobile home park dated July 1, 1992, a copy of which was introduced into evidence as Exhibit "P-1". This lease agreement was for the lease of a mobile home space known as 255 E. Hidden View Drive, #267, Sandy, Utah.

2. The Court finds that Plaintiff's Exhibit "P-2", which was a 15-day eviction notice dated May 5, 1993, was served upon the Defendant, June Johnson, on May 6, 1993, for rule violations as set forth in the notice. The Court specifically finds that the eviction notice was not served upon June Johnson for any religious reasons nor because the Defendant was living in a polygamous family structure. The only intent by the Plaintiff and by its agents in serving said notice was because of rule violations.

3. The Court finds that there are other families in the Plaintiff's mobile home park who are living in a polygamous family structure who have not been evicted. The Court further finds that Defendant has other sister-wives living in the park on separate mobile home spaces and in separate mobile homes who are not being evicted.

4. The Court further finds that the Plaintiff regularly enforces the park's rules and regulations against residents, irrespective of their religion, religious persuasion, family structure, or family status.

5. The Court finds that over a period of four years the Plaintiff in this case and its predecessor in interest, has been required to enforce many rule violations by the Defendant, June Johnson. The Court further finds that the Plaintiff and its predecessor in interest has tried to work with the Defendant, June Johnson, to get her to abide by the rules and regulations of the mobile home park during this time period.

6. The Court finds that the rules and regulations of the mobile home park in this particular case, and especially those rules and regulations which were enforced by the park in the two eviction notices it served, are reasonable and necessary to promote the health, safety, and welfare of the park residents.

7. The Court finds that after the Defendant was served with the 15-day notice dated May 5, 1993, the Defendant attempted to cure the rule violations as set forth in that notice. The Court finds that the Defendant did completely cure the unlicensed vehicle violation and completely cured the mobile home painting violation.

8. The Court also finds that the Defendant did much to cure the violation relating to the condition of her lot being kept in a neat, clean, and weed free condition. The Court finds that the Defendant removed much of the garbage and weed growth surrounding her mobile home; however, the Defendant did not remove all of the garbage and weeds and therefore never fully cured the violation relating to the condition of her mobile home lot.

9. The Court finds that as time went on after the 15 days expired from the May 5, 1993 notice, the Defendant failed to

maintain her yard in a clean, neat and weed free condition. This Court finds that the Defendant failed to continue to control the weed problem at her premises as evidenced by significant new growth in weeds. The Court further finds that additional new garbage, trash, and other objects accumulated on Defendant's lot. The Court finds that because of the ongoing nature of this violation, and the fact of the new weed growth, new garbage, and new accumulations of other junk or trash on her lot; this was a new violation of the rules.

10. The Court further finds that after the expiration of the May 5, 1993 notice, the Defendant violated on several occasions another rule of the park relating to violation of the curfew rule for her minor son Jared.

11. The Court finds that after the May 5, 1993 notice had expired, the Defendant received two oral notices from Mr. Shupe that she was again failing to maintain the garbage, trash, and weeds on her lot, which was a violation of the park rules. These verbal warnings were given to the Defendant in July of 1993, and the Defendant did absolutely nothing about the warnings and ignored them.

12. The Court finds that the garbage, trash, and weed problems on the Defendant's lot were ongoing in nature because of continued accumulation of weeds, trash, and garbage. The Court finds that this problem worsened with time and that when Plaintiff on August 3, 1993 served its notice of lease termination for repeated failure to comply. This notice was introduced as Exhibit

"P-3". The Court finds that this eviction notice was served after a passage of more than sixty days from the expiration of the May 5, 1993 notice, and considering the nature of the rule violations, the Court finds that this was a reasonable period of time that would not trigger or require an additional period of cure or an additional new 15-day notice as suggested by the Defendant in this particular case.

13. The Court does not find under the specific facts of this case that a new 15-day notice was required by the lease agreement itself, by the law submitted to the Court by the Defendant, or by the application of the applicable statutes. In fact, the Court finds that the applicable statutes and notices served in this case are to the contrary and do not require an additional period to cure.

14. The Court finds that the rental check of $425.00 received by the Plaintiff from the Defendant on August 2, 1993, was for delinquent rent for the months of June and July, 1993, leaving the month of August, 1993 still outstanding. The Court finds that this rent was received and deposited by Plaintiff prior to the time the Defendant was served with an eviction notice on August 3, 1993. The Court finds that the date of tender of the check by the Defendant was the date of payment on August 2, 1993, that the Plaintiff deposited said rent check before service of an eviction notice, and that the Defendant's argument that the Defendant's check had not cleared all banking channels in the Federal Reserve System prior to the service of the eviction notice is not a valid

argument.

15. The Court finds that Mrs. Brenda Shupe was a very credible witness for the Plaintiff, despite the fact that she appeared to be getting a little bit irritated on the witness stand. The Court finds that her credibility was not attacked in any substantial way by the defense, and the Court places great weight on her testimony, credibility, and veracity of her testimony. The Court finds that Mrs. Shupe was instructed by June Johnson to apply a $400.00 check dated July 19, 1993, to one of the Defendant's sister-wives' mobile home spaces in the park and not to the Defendant's space. This finding is further backed up by the fact that June Johnson came in and paid rent on August 2, 1993, in the amount of $425.00, and had she paid rent for her own space on July 19, 1993, in the amount of $400.00, she would have been making a very substantial overpayment of rent on August 2, 1993.

16. The Court finds that it was a common occurrence for June Johnson or one of her sister-wives to come to Mrs. Brenda Shupe and pay the monthly rental payment for another sister-wife who was occupying a separate mobile home space within the Plaintiff's mobile home park, and that this was done by June Johnson on or about July 19, 1993, even though she had previously been served with a 3-day eviction notice for nonpayment of rent, which had not been cured. The Court further finds that after the payment of rent on August 2, 1993, despite the fact that the Defendant was not current on the rent, that the Plaintiff only served an eviction notice relating to rule violations of the park

and not to delinquency in rent.

17. The Court finds that Mrs. Shupe made an honest mistake in the record keeping and clarified that mistake during the course of her testimony when she pointed out the fact that after receiving August 2, 1993 rent, one part of her ledger reflected that that was payment of rent through August of 1993. The Court further finds that another part of Mrs. Shupe's ledger did reflect that there was still one month's rent owing after the payment of rent by June Johnson on August 2, 1993.

18. The Court finds that the other residents in Plaintiff's mobile home park have had their general health, safety and welfare impacted negatively as a result of the Defendant's failure to maintain and control the weed problem, the trash problem, the garbage problem, and the curfew violations by the Defendant's son. The Court also finds that the Defendant lived next to another resident who would find dirty diapers and other trash in her yard, which the Court finds came from the yard of Defendant.

19. The Court also finds that the Defendant did not control the actions of her son and that he violated curfew limitations on a number of occasions after May of 1993 and prior to August 3, 1993. These curfew violations included lighting fireworks in the park late at night, which fireworks landed in at least one neighboring mobile home space.

20. The Court finds that although Plaintiff had no contractual duty to do so, the Plaintiff occasionally provided an

opportunity for residents during the course of the year to place trash or other items in a dumpster or in Mr. Shupe's trailer. The Court finds that the Plaintiff made Defendant, June Johnson, aware of the availability of its dumpster and trailer for use in cleaning up her lot. The Court further finds that Mrs. Johnson did not take advantage of the use of the dumpster or trailer for use in hauling off garbage from her lot.

21. The Court finds that the Plaintiff engaged in no conduct that would have led the Defendant, June Johnson, to believe that the Plaintiff would waive strict compliance with the park rules, regulations, and lease agreement. This findings is an additional basis why the Court finds that the Plaintiff was not required under the facts and circumstances of this case to provide new notice or a new opportunity to cure in this particular case after the first 15-day notice. The Court finds that because of the ongoing nature of the rule violations by the Defendant, that the equitable considerations in this particular case weigh heavily in favor of the Plaintiff and not the Defendant, because, among other things, the evidence clearly established that the Plaintiff had worked with the Defendant a number of times and over a long period of time in an effort to get her to cure rule violations, including those rule violations which are the subject of this particular lawsuit. There was a pattern established that the Plaintiff tried to work with the Defendant; and, hence, the equitable considerations in this Court's opinion point in favor of the Plaintiff.

22. The Court finds that for the most part the authorities cited by the Defendant's trial brief are distinguishable from the facts of this particular case. For example, the Court found that the Woodland Theaters, Inc. v. ABC Intermountain Theaters, Inc. case, 560 P.2d 700 (Utah 1977) was not applicable to this particular action because, in this case, the Court has found that the Plaintiff did not accept rent after the notice of termination was served, and the Court has found that the rent paid was for delinquent past rent and not the present or future rent.

23. The Court finds that the notices in this particular case were legally sufficient, consistent with the lease agreement, and consistent with Utah Code Annotated §57-16-5 and Utah Code Annotated §57-16-6.

24. The Court finds that its previous order entered in January of 1994 relating to the dismissal of the counterclaim was a dismissal without prejudice and that there may be other legal issues or concepts in this case that may impact on whether or not the Defendant can revive this counterclaim, especially in light of the fact that the Court has clearly found that the Plaintiff did not bring its eviction proceeding for any reason other than rule violations and that the Plaintiff did not discriminate in any way against the Defendant on the grounds of religion, family status, or family lifestyle of the Defendant due to the fact that the Defendant is a polygamist.

25. The Court finds that it is reasonable to enter in a

no cause of action judgment on the third party complaint which was brought by the Defendant, June Johnson, against the three individuals listed as Third Party Defendants. The Court finds that the Defendant failed to establish this cause of action by any evidence whatsoever, and that the evidence introduced by the Plaintiff clearly establishes that the third party complaint has no merit whatsoever due to the fact that this action, and the motivation therefor, was based solely upon rule violations of the park and not any religious, lifestyle, or family structure issues whatsoever.

26. The Court finds that the attorney's fees in this case requested by the Plaintiff are reasonable. In making this finding, the Court finds and states that it reviewed the affidavit of Plaintiff in support of attorney's fees and costs on a line by line basis and that it did not make a summary review of the document. The Court also reviewed line by line each task described on each line in the affidavit and made a specific and separate evaluation of the reasonable period of time it would have taken to perform each task. The Court also, in finding that the attorney's fees were reasonable, reviewed the full history of this case in an attempt to determine what a reasonable attorney's fee would be in this particular case. The Court finds that this was not a typical unlawful detainer case and that it became far more involved and time consuming and complex. This case actually started out in Circuit Court but, as a result of the answer and claims filed by the Defendant, this particular case was ultimately transferred to

the District Court. There were a number of motions filed by both parties in this case which made it a little more unusual as compared to a standard eviction case. The Defendant in this case represented herself, filed a motion to quash early in this case and a request for attorney's fees even though she was pro se and not a lawyer. The Defendant also filed a motion for clarification of rehearing on this Court's ruling striking the counterclaim. There were a number of motions filed with discovery issues by the Defendant, as well as motions for summary judgment filed by the Defendant. The Defendant also appealed one of this Court's prior orders to the Utah Supreme Court, to which the Plaintiff had to respond. At one point in this case the Court was required to grant Plaintiff's motion for a protective order because of the overburdensome discovery that was being requested by the Defendant. The Court finds this case has a very long history and this Court is of the opinion that the case did not move along the system as efficiently as it probably should have because of the fact that the Defendant in this case was pro se and continued to file numerous pleadings with the Court to which the Plaintiff had to respond and required additional attorney's fees.

27. The Court finds that the hourly rate charged by the Plaintiff of $95.00 an hour, taking into consideration the Plaintiff's expertise in this particular area of the law, is a reasonable hourly rate in this community for these types of services. The Court has used its background to determine that this was a reasonable rate in light of the fact that it is regularly

confronted with the issue of attorney's fees and is knowledgeable of what attorneys in this community charge.

28. The Court finds that the Plaintiff's request for attorney's fees in the amount of $9,367.50 and $46.00 in costs is reasonable. The Court finds that the Plaintiff's attorney put in approximately 100 hours of legal services, much of which was necessitated by the inefficiency of the Defendant in this particular case to deal with various issues that arose during the course of the case. The Court finds that 100 hours was a conservative figure of time incurred by the Plaintiff's attorney and that this figure was reasonable. The Court finds that every entry as to time and task described in the Plaintiff's affidavit for attorney's fees was reviewed by the Court and was reasonable. The Court finds that there was a rational, reasonable relationship between each task and the time allotted for the task, and nothing appeared to be inflated in the affidavit. The Court therefore finds that the request for attorney's fees and costs are reasonable and should be granted.

29. The Court finds that the Defendant breached the lease agreement by failing to follow the rules and regulations of the park in this particular case and that the Defendant committed a new rule violation in light of the continuing nature and ongoing nature of the violations of trash, garbage, and weeds, as well as the violation relating regarding the curfew of her son.

30. The Court finds that the Plaintiff is entitled to have the lease agreement between the parties terminated and that

the Clerk of the Court should issue a writ of restitution restoring Plaintiff to the premises.

31. The Court finds that Plaintiff is entitled to judgment for rent from August of 1993 through March 31, 1994, in the amount of $195.00 per month and for judgment in the amount of $205.00 per month for the time period beginning April 1, 1994 to the date of trial for a total of $3,200.00.

32. The Court finds that the Plaintiff is entitled to all rents which are currently being held in trust by the Clerk of the Court and that these rents should be credited against the judgment being rendered herein.

## CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the Court concludes that:

1. That Plaintiff is entitled to judgment against Defendant in the amount of $3,200.00 principal, $9,367.50 attorney's fees, and $46.00 costs;

2. The Court concludes that the notices served in this case were legally sufficient, consistent with the lease agreement, and consistent with Utah State statutes, including Utah Code Annotated §57-16-5 and §57-16-6.

3. The Court concludes that the lease agreement between the parties should be terminated and that the Plaintiff is entitled to a writ of restitution restoring the premises to it located at 255 East Hidden View Drive, #267, Sandy, Utah.

4. The Court concludes that Plaintiff has met its burden of proof on all issues in the case.

5. The Court concludes that the third party complaint filed by the Defendant should be dismissed with prejudice.

6. The Court concludes that the attorney's fees requested by the Plaintiff are reasonable based upon all the facts and circumstances of this case.

DATED this 2 day of Dec, 1994.

BY THE COURT:

Tyrone E. Medley

Judge Tyrone E. Medley

STATE OF UTAH
THIRD DISTRICT COURT
SALT LAKE

APPROVED AS TO FORM:

John T. Anderson
Attorney for Defendant

014-072-bn